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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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April 15, 2010

The Honorable Jeff Sessions
Ranking Republican Member
Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, D.C. 20510

Dear Jeff:

After the extended discussion at our business meeting this morning, I received another letter about the Goodwin Liu hearing. As I previously told you, after I delayed scheduling the hearing until March 24 at your request, and then did not hold it that morning, again in order to accommodate the schedules of Republican members, I was disappointed to learn that an anonymous Republican objection under the Senate's two-hour rule prevented that hearing from going forward. Given that, it is difficult to delay the hearing any further. Nonetheless, I would have been willing to discuss this with you had you not decided to proceed at this morning's business meeting with what Senator Feinstein properly characterized as an attack on Professor Liu.

As I indicated in my letter last week, while I am disappointed that Professor Liu and the administration did not provide the materials provided in supplements, those materials hardly disqualify him from serious consideration by the Committee. I believe a fair and thorough review of his record will demonstrate his faithfulness to the rule of law and the Constitution, and his respect for this Committee and Congress.

Professor Liu has not been a stealth candidate. He has produced voluminous materials. Committee members have had more than seven weeks to review this nominee's record. Republican members seem to be applying a standard to President Obama's nominees that they did not demand of President Bush's. It also appears that the Republican members of the Committee decided to oppose his nomination long ago. I join Senator Feinstein in urging you to approach his hearing tomorrow fairly, and with an open mind. As she indicated, the weeks of unanswered attacks on Professor Liu and his record should not continue.

Contrary to suggestions that the April 5 supplement was extensive, the supplement you describe as being 117 items actually included only 21 unique items containing comments in Professor Liu's own words. The remaining items were duplicates of already-submitted items, cursory updates, listings of events and news articles. Two weeks is more than sufficient time for a fair and thoughtful review of this small number of new items, especially as none of the items presented new issues or unfamiliar topics from those in the rest of Professor Liu's record, which he had previously provided to the Committee, and which could already serve as a basis for inquiry and questioning of the nominee.

This is especially true in light of the Professor Liu's well-known record as a widely-respected constitutional law professor. As conceded by a Fox News commentator, Professor Liu's qualifications for the appellate bench are "unassailable." It has been apparent since he was nominated that Senate Republicans were familiar with his record, immediately declaring themselves "disappointed" by the President's nomination of Professor Liu and claiming that Professor Liu was "far outside the mainstream of American jurisprudence." This opposition was instantaneous and has continued. It is time to hear from Professor Liu himself.

The tenor of the rhetoric at today's business meeting, including suggesting criminal charges against Professor Liu, appear dramatically out of proportion to the small amounts of additional materials that Professor Liu belatedly provided to the Committee. The rhetoric and heightened scrutiny you seek to apply to Professor Liu's nomination are also inconsistent with the Committee's past practices with respect to the amount of materials that must be provided by a nominee.

Today I mentioned the late supplementation of the materials provided by Chief Justice Roberts when he was before the Committee—more than 15,000 responsive documents were delivered to the Committee only four days before his hearing was scheduled to begin. Hundreds of requested documents were never provided. I did not hear any complaints from Republican members at that time. Indeed, neither Chief Justice Roberts, nor Justice Alito, provided summaries of the speeches and remarks they listed in response to the Committee's questionnaire.

No Republican Senator questioned Judge Catharina Haynes, a nominee of President Bush to the Fifth Circuit, on her blanket, nonspecific answer to the question calling for speeches, which was a typical answer for Bush nominees. She wrote:

“As a local judicial candidate, I have been to dozens, maybe hundreds, of events where each candidate is asked to introduce himself or herself and given 30 seconds to 2 minutes to speak about his or her qualifications. I have no recordings or notes of these matters and no way to track accurately the dates and locations of these events.”

For several speeches she listed dates as “in the 2000’s” and “1998”, but provided no notes or recordings. Judge Haynes was confirmed by the Senate by voice vote.

Judge Jeffrey Sutton, nominated by President Bush to the Sixth Circuit, submitted a questionnaire that listed none of his speeches in particular, but described them in the following manner:

“I have given numerous speeches to local bar associations, Ohio judges (through the Ohio Judicial College), The Federalist Society, and Continuing Legal Education seminars regarding the United States Supreme Court and the Ohio Supreme Court. In each of these instances, I either spoke from informal notes or spoke extemporaneously.”

No Republican Senator asked for more information.

Nor did Republican Senators ask for more information from Judge Diane S. Sykes, a nominee of President Bush to the Seventh Circuit, who wrote the following in response to the Committee’s question asking for speeches:

“I have also spoken and taught at civic, legal and other events during the course of my judicial career. My campaign speeches typically related to my qualifications for judicial office and the role of the judiciary in our representative system of government; I often delivered these remarks extemporaneously. My speeches to civic groups have related to the judiciary and court system generally (e.g., the role and operation of the state supreme court; women in the judiciary; balancing a judicial career and a family.) I have been an instructor or team-teacher at a number of judicial and legal continuing education seminars, including the Wisconsin Judicial College, on topics of criminal law and procedure, sentencing law, and trial practice. I do not have copies or outlines of these speeches and lectures.”

No Republican Senator asked for more information from Kent A. Jordan, a nominee of President Bush to the Third Circuit, who responded to the Committee's question asking for speeches:

"I have been a speaker or a panelist at professional conferences and classes (e.g., on intellectual property issues, civil procedure, advocacy, and professional responsibility) over the years, but I am not aware of any of the speeches or remarks having been reproduced in print or on videotape, except that I have been told my recent participation as a panelist at the May 18, 2006 judicial conference of the United States Court of Appeals for the Federal Circuit was recorded and broadcast on C-Span. I do not have a copy of that recording."

No Republican Senator called into question the responsiveness of Brett Kavanaugh, President Bush's controversial nominee to the D.C Circuit, whose preface to his list of speaking events acknowledges the limitations of the ability of nominees to capture every speech they have given. He wrote:

"I have given remarks on occasion in official and personal capacities. These remarks have most often occurred at legal conferences and on panels. I also have guest-taught classes at various law schools. In the White House Counsel's office, I also spoke to visitors to the White House and on Capitol Hill. I generally have spoken with short written points, which I have not ordinarily retained, rather than prepared speeches. I also have not maintained an ongoing list of remarks, but I have attempted to reconstruct a responsive list for this purpose. I will supplement the list if I become aware of other speeches that fit within this question."

Similarly, no Republican Senator asked for additional information from Richard A. Griffin, President Bush's Sixth Circuit nominee, who wrote in response to the Committee's questionnaire: "I have delivered several speeches, no[ne] are in written or videotape form."

Nor were there calls from Republicans for more complete responses from Priscilla Owen, President Bush's controversial nominee to the Fifth Circuit, who responded to the Committee: "The only speeches I have given on legal policy were extemporaneous, and there are no press reports."

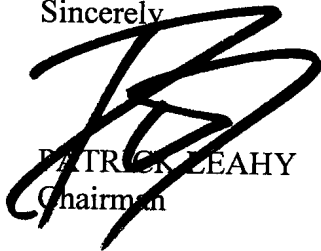
Nominee after nominee of President Bush's provided far less detail about their records to the Committee than Professor Liu has provided. Yet no Senator threatened criminal charges for failure to provide what has amounted to a small amount of largely redundant material.

The Honorable Jeff Sessions
April 15, 2010
Page 5 of 5

Richard Painter, who was the chief White House ethics lawyer under President George W. Bush during the Roberts and Alito nominations and worked with numerous of President Bush's nominees, recently wrote in an online post that Professor Liu's, "original answers to the questions were a careful and good faith effort to supply the Senate with the information it needed to assess his nomination" and that "he provided a lot more information than many nominees do in response to these questions." Mr. Painter wrote about the supplemental materials: "Given Professor Liu's stature in his field and his many speaking invitations – and the fact that he was also associate dean which involves yet more speaking – a lot of the items he left off of his original Senate disclosure form were relatively unimportant and/or redundant of what he had already disclosed." Mr. Painter concluded that now that Professor Liu has provided the additional information, "I doubt the Senators will learn anything new from it."

I agree with Mr. Painter that Professor Liu has provided the Committee with more materials than many nominees. I recall numerous nominees of President Bush who provided far less and yet no Republicans called for delays or called into question the sincerity of those nominees in responding to the Committee.

Sincerely



PATRICK LEAHY
Chairman